IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 821 OF 1979

Union of India .. Plaintiffs.

vs.

Shantilal Motilal Mehta .. Defendant.

Mr. Rajguru for plaintiffs.

Ms. Sidhwa for defendant.

CORAM : S.U. KAMDAR, J.

DATE : 2nd May, 2006.

ORAL JUDGMENT :

. The present suit is filed by the Union of India seeking declaration that the assignment of seven insurance policies and payment of premiums thereunder by the original defendant no. 3 is with an intention to defraud the creditor i.e. Income-tax Authorities. The plaintiffs have also sought a decree against the 4th defendant for handing over of the proceeds of all the seven insurance policies to the plaintiffs herein. Various other interim reliefs are also sought.

2. Some of the material facts of the present

case briefly enumerated are as under :-

3. The original 3rd defendant took out seven insurance policies on his life and assigned five policies in favour of the wife, one policy in favour of the wife and five children and another policy in favour of wife and two sons. It is the case of the plaintiffs that the original 3rd defendant was apprehended by the Customs Authorities on 18.9.1958 and diamonds worth Rs. 2,79,900/- were found in the taxi occupied by him. This amount was included in his total income for the assessment year 1959-60 and the previous year being 1.4.1958 to 31.3.1959. It is the case of the plaintiffs that the assessment for the year 1959-60 was finalised on 21.3.1964 and the taxable income was determined as being Rs. 2,24,302/-. Accordingly, a demand was raised on the original defendant no. 3 by the plaintiffs for a tax due of Rs. 2,46,798/-. It is the further case of the plaintiffs that however the original defendant no. 3 had filed return for the previous year 1958-59 on 16.10.1959 declaring his total income at Rs. 3,190/- only. On or about 9.7.1959 the original 3rd defendant assigned his two policies which were obtained on 25.11.1953 being Policy No. 466492 and 466493 under the Married Women’s Property Act, III of 1874. The beneficiary designated under the said assignment was the original defendant no. 1. On 1.6.1960 the original defendant no. 3

obtained a third policy from LIC being Policy No. 13330674 for Rs. 15,000/- and the policy was assigned to the wife under the Married Women's Property Act, III of 1874. Thereafter the original defendant no. 3 further obtained various policies and under Section 6 of the Married Women's Property Act, III of 1874 assigned the benefits of the said policies to his wife who was the original defendant no. 1. It is the case of the plaintiffs that the notice of demand was served on the original defendant no. 3 sometime on or about 24.3.1964 and since taxes were not paid the recovery certificate was issued on 26.3.1965 which was received by the Additional Collector of Bombay on 31.3.1965. It is the case of the plaintiffs that to avoid the payment of huge tax liability the original defendant no. 3 has with intention to defraud revenue has assigned the said policies to the original defendant no. 1 and his children. It is the case of the plaintiffs that the said assignment is void by virtue of the fact that the same was with a view to defraud the revenue and/or creditors and thus the plaintiffs are entitled to declaration that the said assignment is void under proviso to section 6 (1) of the Married Women's Property Act, III of 1874. When the Income-Tax Authority issued prohibitory order on defendant no. 4 on 8.4.1971, the original defendant no. 3 filed a Misc. Petition being Petition No. 543 of 1990 in this Court challenging the said

attachment of the policies towards the tax liabilities. By an order and judgment dated 17.3.1979 the learned Single Judge of this Court directed withdrawal of the attachment and observed that if the revenue authorities desire to establish that the said policies are assigned with the intention to defraud the creditors then they may follow the remedy of a civil suit. Accordingly, the present suit is filed questioning the assignment of the policies in favour of the original defendant no. 1 by the original defendant no. 3 and/or assignment in favour of the children. Both the original defendant nos. 1 and original defendant no. 3 have since expired and their legal heirs are brought on record.

4. The original defendant no. 3 filed a written statement during his life time and in the written statement it has been contended by him that the said assignment of policies are under the provisions of the Married Women’s Property Act, III of 1874 and thus the trust has been created in favour of original defendant no. 1 and the children in respect of the amounts covered by the said policies. The original defendant no. 3 has taken up a contention that under the provisions of section 6 of the Married Women’s Property Act, III of 1874 it is permissible to assign the policy in favour of the wife and children and such assignment thereafter

cannot be questioned unless it is established that the said assignment is with a view to defraud the right of any of the creditors. He has submitted in the written statement that once an assignment is made he has no right, title or interest in the policies and, therefore, his policies cannot be attached and proceeds thereof can not be recovered by the plaintiffs for his so called liabilities. The original defendant no. 3 has further denied that the assignment of the policies was with a view to defeat the claim of the creditors. In para 10 of the written statement it has been submitted that the notice of demand was never served upon him for the assessment year 1959-60 on 24.3.1964 as claimed in the plaint or on any of the date and thus no question of any tax liability being payable and the recovery certificate by the Collector was wrongfully issued. The original defendant no. 3 has also denied that the said policies were assigned to the wife and the children with a view to defeat the rights of the plaintiffs. The defendant nos. 1A to 1D also filed a written statement and have adopted the written statement of the original defendant no. 3.

5. On the aforesaid pleadings, issues were framed by the learned Single Judge by an order dated 29.4.2002 which are as under :-

1. Whether the Plaintiffs prove that Defendant No. 3 purported to assign his two policies being no. 466492 and 466493 and the effecting of the remaining policies in favour of and for the benefit of Defendant No. 1 under the Married Women's Property Act III of 1874?

2. Whether the Plaintiffs prove that Defendant No. 3 was ever apprehended by the Customs Authority and diamonds worth Rs. 2,79,000/- were found and the said amount was included in the total income for the assessment year of 1959-60?

3. Whether the Plaintiffs prove that assignment of two policies no. 466492 and 466493 or the remaining policies under Married Women's Property Act III of 1874 and payment of premium was fraudulent transfer of money with an intention to defraud the Plaintiffs?

4. What order ?"

6. The Commissioner was appointed and one Mr. Uday Bhanu Singh, Advocate has filed a

report. Two witnesses were examined by the plaintiffs and the documents were tendered being Exhibits X-1 to X-11. In so far as the documents are concerned, the plaintiffs have produced the typed and Xerox copies of the documents which have been objected to by the defendants before the Commissioner and, therefore, the Commissioner has marked the said documents as Exhibit X-1 to X-11 for identification purpose. The objection which has been raised by the learned counsel for the defendants is that except document nos. 1 to 4, 8 and 9 the rest of the documents in the compilation are not disclosed in the affidavit of evidence of Mr. Ghanshyam Meena nor the said documents are craved leave to refer to and rely upon in the pleadings before the Court. However, the plaintiffs' Advocate has contended that the said documents are set out in the list of documents filed at the time of filing of the suit. The second objection raised is that the documents are not the original and they are copies. Before me the learned counsel appearing for the plaintiffs has submitted that the original file is missing and, therefore, Xerox copies are produced. However, the plaintiffs are required to establish a case for production of secondary evidence under section 63 read with section 65 of the Evidence Act. Plaintiffs are required to set out the circumstances in which

the said secondary evidence is sought to be produced. No such evidence has been led before the Court or before the Commissioner by the plaintiffs. Thus, it is not possible to accept the said documents Exhibits X-1 to Exhibit-11 on record of the file. I, therefore, do not take the said documents on record. After oral evidence was recorded of the two witnesses of the plaintiffs the matter was placed before me for arguments. The defendant has not led any oral evidence.

7. The insurance company has appeared and submitted a list of the policies which were issued by them and in whose favour the said policies were assigned. The insurance company has already deposited the entire amount of all the seven insurance policies in this Court pursuant to earlier orders passed by this Court. They have produced the receipts of the deposits of the said amount in this Court. Thus, the amounts of these seven policies are lying deposited in this Court.

8. The learned counsel for the plaintiffs has submitted two fold submission. Firstly it has been submitted that irrespective of any evidence which is on record the admitted fact is that the original defendant no.1 and original

defendant no. 3 have both expired and once the original defendant no. 1 has expired the so called beneficial interest created in her favour as a trust comes to an end and the policies must revert back to the estate of the deceased defendant no. 3 and cannot form part of the estate o f the deceased defendant no. 1. It has been thus submitted by the learned counsel for the plaintiffs that irrespective of the fact that the plaintiffs failed to prove that there is an assignment of the policy with an intention to defraud the creditors still the plaintiffs are entitled to recover their dues from the said insurance policies because the said policies reverted back to the estate of the original defendant no. 3 on the death of the original defendant no. 1. It was, therefore, submitted that at least in so far as the policies which are exclusively assigned to the original defendant no. 1 is concerned, the same on her death forms a part of the estate of the original defendant no. 3 and thus in that event the plaintiffs are entitled to recover the said amount and recover the dues of income tax from the said policies.

9. Alternatively, the learned counsel for the plaintiffs has submitted that the said assignment is void. It has been submitted that the assignment was with fraudulent intention. It

has been submitted that under Section 281 of the Income-tax Act, 1961 irrespective of proving any of the transfers as fraudulent or not they are void by virtue of the fact that the said transfers took place during the pendency of assessment proceedings under this Act or after completion thereof but before service of notice under rule 1 of the IInd Schedule. The said Section further provides that if any assessee creates a charge or parts with possession of any of his assets in favour of any other person then such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee as a result of the completion of the said proceedings or otherwise. The learned counsel appearing for the plaintiffs has relied upon section 281 of the Income-tax Act and submitted that irrespective of the fact that the assignment is under the Married Women's Property Act III of 1874 still by virtue of section 281 of the Income-tax Act, 1961 the said transfer is void and the property may be available for the purpose of tax dues and the transfer by way of assignment in favour of the original defendant no. 1 and/or children is bad in law.

10. The learned counsel for the plaintiffs has further alternatively submitted that even on

merit the plaintiffs have been able to establish that there has been a fraudulent assignment of the said policies. It has been submitted that the returns were filed as far back as on 18.9.1958 and, therefore, part of the previous year 1.4.1958 to 31.3.1959 being the assessment year 1959-60. The said assessment return was filed on 16.10.1959 and notices were issued for the same in 1960. It has been submitted that thus when the policies were issued and assigned to the third party they were so assigned with the full knowledge by the original defendant no. 3 that he is likely to face the huge liability of the income-tax because the income tax authorities had proposed to include in the income the value of the diamond worth Rs. 2,79,900/- apprehended by the Customs Authorities. It has been further submitted that even the assessment was finalised on 21.3.1964 and the notice of demand was served on 21.3.1964 on the original defendant no. 3 and, therefore, transfer of at least those policies which were assigned subsequent to the said date of demand i.e. 21.3.1964 was bad in law and the said assignment is void by virtue of the provisions of section 6 of the Married Women’s Property Act, III of 1874 itself which inter alia provides that a person who seeks to assign the policy with intention to defraud the creditors then such an assignment is void and

cannot be accepted.

11. The learned counsel for the defendant on the other hand has contended that the submissions of the plaintiffs are devoid of any merit. In so far as the first contention is concerned, the learned counsel for the defendant has submitted that once the policies are assigned in favour of a third party under the Married Women's Property Act then it becomes the part of the estate of the said assignee and does not any more continue to be a part of the estate of the deceased policy holder. Once the policy is assigned the same no more remains with the person who has obtained such original policy. It has been submitted that there is no question of the policies reverting back to the estate of the deceased as claimed by the learned counsel for the plaintiffs even on the death of the assignee and, therefore, the said contention is baseless and without any merit. On merits it has been contended that the provisions of section 281 which has been relied upon by the plaintiffs cannot be relied upon because the previous year is 1958-59 and assessment year is 1959-60 which was much prior to the provisions of the Income Tax Act, 1961 coming into force. The provisions of section 281 have been brought into effect only after enactment of the Income-Tax Act, 1961 and,

therefore, cannot apply to the previous year and therefore the assessment order which is passed in respect of previous year falling prior to 1961 Act came into force is not applicable to the facts of the present case. It has been submitted that there is no equivalent provision as Section 281 of 1961 Act under the Income-tax Act of 1922 and, therefore, reliance placed on section 281 is without any merit and has to be rejected. Thereafter it has been submitted that in so far as the question of proving the fraudulent transfer or fraudulent assignment is concerned, the plaintiffs have miserably failed to establish anything. It has been submitted that the documents which are filed are not even Xerox copies or not even copies of the original and no evidence has been produced to establish the circumstances under which that the said documents can be introduced as secondary evidence. The learned counsel for the defendant has further submitted that even if the documents are taken into consideration the most vital fact that assessment order and the demand notices were served on the original defendant no. 3 prior to the assignment of the policies is not established by the plaintiffs on evidence. There is no acknowledgement produced of any nature whatsoever to establish that in fact the assessment order dated 21.3.1964 and the notice dated 21.3.1964

were served on the original defendant no. 3 so as to hold that he had knowledge of the fact that there is a liability of huge payment of Income Tax by virtue of adding in his total income the amount of Rs. 2,79,900/- which was added on the basis of the recovery of the said diamonds by the customs authorities. It has been thus submitted that the contention of the learned counsel for the plaintiffs that there is a fraudulent transfer is in fact not established and the plaintiffs have failed to prove the same. It has been thus submitted that the present suit is misconceived and without any merit and the defendant is entitled to the benefits of Section 6 of the Married Women's Property Act, III of 1874 and thus no decree can be passed against him and the amount of the insurance policies which is lying in this Court should be handed over to the defendant herein.

12. It has been further submitted that in any event even if the arguments of the learned counsel for the plaintiffs is correct, still the policies which are assigned to the children of the original defendant no. 3 the assignment continues to remain in force because the trust in so far as in favour of the children is concerned, has not come to an end.

13. In so far as the first contention is concerned, the larned counsel for the plaintiffs has placed reliance upon the judgment of the Chancery Division in the case of Gladitz, Guaranty Executor & Trustee Co. Ltd., vs. Gladitz, reported in 1937 Vol.3 Chancery Division page 173, particularly the following portion which reads as under :-

> " It is understood and agreed that all claims under this policy shall be payable to Winifred Gladitz, nee Worthington, wife of the assured, if she is living at the happening of the event upon which the claim becomes payable, or if she is dead, then to the executors, administrators or assigns of the assured, whose receipt shall be deemed sufficient discharge and relieve underwriters thereon."

> " Two questions arise. The first is whether the policy in question is a policy of insurance effected by the deceased, Charles Julius Gladitz, on his own life, and the second is whether the policy, being in the form which I have stated, is expressed to be for the benefit of his wife. In my

judgment, both questions should be answered in the affirmative. I see no reason for restricting the meaning of the words "a policy of assurance effected by a man on his own life," and I am unable to say that a policy including payments on a number of other events, if it does include provision for payment on that happening, is not a policy within the meaning of the section. In my judgment, a policy providing, as this policy does, for the payment of a sum of money upon the death of a man as the result of an accident is a policy of insurance effected by a man on his own life.

The next question is whether it is expressed to be for the benefit of the wife. The only provision is the provision in the memorandum at the foot of the policy.

I should have been myself doubtful if that memorandum was a sufficient expression that the policy was to be for the benefit of Winifred Gladitz, were it not for two decisions. One of

these is the decision of TOMLIN, J., in Re Fleetwood's Policy (1) and the other that of FARWELL and KENNEDY, L.JJ., in Griffiths v. Fleming (2). Both these cases seem to me to decide that words which in substance are not distinguishable from the words of the memorandum which has been put upon the policy in question are a sufficient expression of intention that it is for the benefit of the person to whom the policy moneys are to be paid. Both decisions bind me, and I propose to follow them. Because of these decisions, which are authorities, this policy is a policy expressed to be for the benefit of Mrs. Winifred Gladitz within the provisions of the Married Women's Property Act, 1882, s. 11, and I therefore decide that Mrs. Winifred Gladitz is solely and beneficially entitled to the moneys paid by the underwriters under the policy, and that the moneys do not form part of the estate of the said Charles Julius Gladitz, deceased. The costs of the summons to come out of the estate, if it is sufficient. If the estate is insufficient, the

> balance to be payable out of the policy moneys."

14. She has thereafter relied upon the judgment of this Court in the case of Mis Maria Antonica Rodriques vs. B.R. Baliga and others, reported in AIR 1967 Bombay 465. The said judgment is relied upon for the limited purpose to show that the English Married Women's Property Act, 1882, section 11 was identical to the provisions of section 6 of the Married Women's Property Act, III of 1874 in India.

15. The learned counsel for the defendant has thereafter relied upon the judgment of the Chancery Division in the case of in re ADAM'S POLICY TRUSTS, reported in 1883 Vol. XXIII Chancery Division, page 525.

16. Thereafter he relied upon the judgment of the Chancery Division in the case of Cousins v. Sun Life Assurance Society, reported in 1933 Chancery Division, page 126. The relevant portion is as under :-

> "In the present case, which arises under the Act of 1882 and where there is a persona designata, the wife indicated by name, an absolute

interest is taken by her by virtue of the statute and a trust created in her favour. That trust still remains uncompleted and unperformed until the date shall arrive when she, or, as it is now, her personal representatives, receive the money, and while that state of things continues the Act negatives any interest passing to the husband."

17. Thereafter the learned counsel for the defendant relied upon the judgment of the Chancery Division in the case of PRESCOTT v. PRESCOTT reported in 1906 Chancery Division Vol. 1 page 155.

18. The provisions of Section 6 (1) of the Married Women’s Property Act, 1874 reads as under :-

"6. Insurance by husband for benefit of wife.-- (1) A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife,

or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate.

When the sum secured by the policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold the same, be paid to the Official Trustee of the State in which the office at which the insurance was effected is situate, and shall be received and held by him upon the trusts expressed in the policy, or such of them as are then existing.

And in reference to such sum he shall stand in the same position in all respects as if he had been duly appointed trustee thereof by a High Court, under Act No. XVII of 1864 (to constitute an Office of Official Trustee), section 10

Nothing herein contained shall operate to destroy or impede the right of any

creditor to be paid out of the proceeds of any policy of assurance which may have been effected with intent to defraud creditors."

19. The relevant portion of the provisions of section 11 of the English Married Women's Property Act, 1882 reads as under :-

"..... A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, from part of the estate of the insured, or be subject to his or her debts: ....."

20. The judgment of the larned Single Judge of this Court in the case of M.A. Rodrigues vs. B.R. Baliga (supra) has held that

the language employed by the British Parliament in this Section and the language employed in section 6 of the Married Women's Property Act in India is identical though the language in Indian Act is little bit ambiguous than in the English Act. However, the learned Single Judge has held as under :-

> "In view of the objects of the legislation there is no reason to think that the intention of the Indian Parliament was any different than the intention of the British Parliament as expressed in Section 11 of the English Act."

21. For the purpose of considering the arguments of the learned counsel for the plaintiffs that on the death of the original defendant no. 1 the property reverts back to the estate of the original defendant no. 3 it has become necessary to see whether the provisions of both the English Act and Indian Act are para materia identical or not. The reading of the provisions and the view taken by this Court in the case of M.A. Rodrigues vs. B.R. Baliga, I am of the view that the said provisions are identical and, therefore, the judgments of the English Courts can always be taken into

consideration as a persuasive value. The English Courts have unequivocally held in the aforesaid judgments that on the death of the beneficiary the policy does not revest back in the original insurer. It has been held that once the vesting takes place the vesting is complete and on the death of a person the property dvelves on the heirs as if the property forms part of the estate of such deceased to whom the policies were assigned during the life time. In the light of the judgments of the English Courts taking consistent view on the aforesaid basis and in light of the fact that the provision of the Indian Act is identical, I am of the view that the contention of the learned counsel for the plaintiffs that the property vests in the beneficiary only for the limited purpose of trust during life time and on the death of the beneficiary the property reverts back to the original insurer, can not be accepted. The learned counsel for the plaintiffs have not relied upon any authority whether Indian or English in support of his aforesaid contention which I am not inclined to accept. The view taken by the English Courts is that once the vesting takes place under the Married Women's Property Act then that vesting is absolute and property therefore forms the part of such deceased person's estate who is the beneficiary

and it cannot revert back to the original insurer. In the aforesaid circumstances, I reject the contention of the learned counsel for the plaintiffs that on the death of the original defendant no. 1 the policies reverted back to the original defendant no. 3's estate and thus the plaintiffs are entitled to recover the said amount irrespective of the fact that whether the said fraudulent assignment is proved or not.

22. This leads me to the next contention namely, the contention of the learned counsel for the plaintiffs that under section 281 of the Income-Tax Act, 1961 the said transfer or assignment under Section 6 of the Married Women's Property Act III of 1874 is bad in law and/or void. In so far as this contention is concerned, on admitted facts that in the present case the assessment order is for the previous year 1958-59 and the assessment year is 1959-60 both being prior to the coming into force of the 1961 Act, in my opinion the provisions of section 281 cannot apply to the assessment year when the said Act was not in operation. Merely because the assessment order is passed in 1964 does not make the provisions of section 281 applicable to the previous year of 1958-59 being assessment year 1959-60. In my opinion, the reliance placed on section 281 is baseless and without any merit.

It has been clearly conceded by the learned counsel for the plaintiffs that there is no equivalent provision as section 281 of the Income Tax Act, 1961 in the previous Act being Income Tax Act, 1922. In that light of the matter, the contention that the assignment is void by virtue of provisions of section 281 of the Income Tax Act, 1961 cannot be accepted and is required to be rejected.

23. This leads me to the third and last contention which has been advanced by the learned counsel for the plaintiffs namely that the assignment is void because it was done with fraudulent intention to avoid the liability to the creditor particularly in view of the fact that the original defendant no. 3 was aware that there is likelihood of a huge tax liability by virtue of recovery of diamonds from him and thus with a view to avoid that liability of income-tax the original defendant no. 3 has sought to assign the said policies by taking advantage of section 6 of the Married Women's Property Act III of 1874. In so far as this contention is concernedly firstly the plaintiffs have miserably failed to produce any evidence whatsoever. The documents produced which were in respect of income-tax assessment record the learned counsel for the plaintiffs has stated that the said

entire original file of assessment is lost and not traceable. No evidence is led in respect of secondary evidence to be brought on record. Xerox copies are not admitted in evidence because the defendants have objected and the plaintiffs have not led any evidence to establish the reasons or grounds under which the secondary evidence should be admitted. Even otherwise I am of the opinion that the plaintiffs have failed to establish that there is a fraudulent assignment. Admittedly the only ground on which the aforesaid contention is raised is that the assignment is void and is fraudulent on the basis of the service of the assessment order dated 21.3.1964 and notice of demand also dated 21.3.1964 on the original defendant no. 3. In my view the said submission cannot be accepted because no acknowledgement whatsoever has been produced on record. Even Xerox copy of any such acknowledgement is also not produced nor any circumstantial evidence to establish that in fact the notice of demand was served on the original defendant no. 3 has been laid in evidence. Once the plaintiffs fail to establish that there is any service of the notice of demand and assessment order on the original defendant no. 3 by the plaintiffs then the entire argument of fraudulent assignment only based on the said assessment order and demand notice must fall to

ground. Thus, apart from the fact that the plaintiffs have failed to prove that the assignment is fraudulent and the burden of proof being on the plaintiffs, it was the plaintiffs duty to prove the same but the defendant has established that there is no service of notice of demand or the assessment order and, therefore, the question of establishing that the assignment is fraudulent cannot and does not arise. In my opinion, the plaintiffs have failed to discharge the burden of proving the said fact which was on them to establish that the assignment of the policies under Section 6 of the Married Women's Property Act III of 1874 is fraudulent and with the intention to defeat the rights of the creditors. In that light of the matter, the suit must fail. Accordingly I dismiss the suit. However, there shall be no order as to costs.

. The learned counsel appearing for the plaintiff seeks a stay of the order and the stay on the withdrawal of the amount of insurance policies which is already deposited in this Court. Stay is granted for a period of eight weeks from today.